

STATE OF MICHIGAN
COURT OF APPEALS

SALLY PLUMLEY,

Plaintiff-Appellant,

v

TRINITY EVANGELICAL LUTHERAN
CHURCH OF KALAMAZOO,

Defendant-Appellee.

UNPUBLISHED

August 14, 2003

No. 239908

Kalamazoo Circuit Court

LC No. 00-000326-NO

Before: Whitbeck, C.J., and Smolenski and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of no cause of action entered after a jury verdict in favor of defendant on a premises liability action. We affirm.

On November 9, 1997, plaintiff was visiting her daughter, Debbie Harrison, a tenant in an apartment building owned by defendant. As plaintiff was leaving the building, one of the cement pads fractured when she stepped on it, causing her to fall and severely injure her ankle. On appeal, plaintiff asserts several errors regarding the court's evidentiary rulings.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Barrett v Kirtland Comm College*, 245 Mich App 306, 325; 628 NW2d 63 (2001). "An abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences perversity of will, a defiance of judgment, or the exercise of passion or bias." *Id.*

Plaintiff first argues that the trial court abused its discretion when it allowed defendant to present evidence of the absence of prior complaints or incidents on the cement step to prove that defendant was not negligent. However, the record reveals that the trial court allowed this testimony, not to prove that defendant was not negligent, but rather, to rebut plaintiff's claim that defendant knew or should have known about the hazardous condition. It is well settled that "evidence of the absence of previous accidents should not be admitted to prove absence of negligence." *Kurczewski v Michigan State Hwy Comm*, 112 Mich App 544, 550; 316 NW2d 484 (1982). However, this Court has held that evidence of absence of prior accidents is admissible to show lack of notice. *Stitt v Holland Life (On Remand)*, 243 Mich App 461, 470-471; 624 NW2d 427 (2000); *Belfry v Anthony Pools, Inc*, 80 Mich App 118, 123-124; 262 NW2d 909 (1977).

This rule is tempered, of course, by MRE 403, under which even relevant evidence can be inadmissible if it's prejudicial effect outweighs its probative value.

Here, plaintiff presented no evidence to establish that defendant affirmatively knew that the cement pad was in a dangerous condition, rather she argued that as a result of the building manager's observations, defendant should have known the pad was hazardous, i.e., defendant's injury was foreseeable. Defendant's building manager, James Allen, testified that he knew of the crack in the cement step, knew that the steps were at least seven years old, and knew that a piece of cement had already broken off from the next slab. Allen also testified that he thought the unevenness of the cement was the result of "settling" caused by soil compaction, not because soil was eroding underneath the cement, and he did not believe the condition of the step posed a safety risk, particularly because he himself had walked over it countless times without incident.

In addition, plaintiff's daughter Harrison testified that, in her opinion, the cement was in poor condition at the time of plaintiff's accident, and that she did not inform anyone because she believed the cement's condition was obvious. She observed that the concrete was slanted and cracked, and that water and ice would build up in the area. Harrison stated that she told Allen about the ice build-up and was given a bucket of salt; the inference being that the build-up was caused by the condition of the cement. On these facts, we find that the trial court did not abuse its discretion in admitting the evidence of the lack of prior accidents to show defendant's lack of notice in order to rebut plaintiff's contention that defendant should have known the cement pad was unsafe. Moreover, we note that the jury was given a cautionary instruction not to use the evidence as substantive evidence of defendant's lack of negligence, limiting its use of the evidence to establish lack of notice only.

Plaintiff next argues that the trial court abused its discretion in admitting a City of Kalamazoo certificate of code compliance issued in October 1997 for the limited purpose of showing defendant's lack of knowledge of the hazardous condition. Plaintiff contends that the compliance certificate was not relevant and was more prejudicial than probative on the issues of whether defendant knew or should have known about the dangerous condition, and whether defendant breached its duty of care under SJI2d 19.03. In premises liability cases, a possessor of land owes no duty to its invitees to protect them against unforeseeable dangerous conditions that the invitor did not know of or could not have discovered through reasonable inspection. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; emphasis added.

In the instant case, testimony taken outside the presence of the jury indicated that before a Certificate of Compliance can be issued, a housing inspector, who deals with property maintenance, does an "overall type of inspection." Issuance of the certificate means that the building met all of the minimal housing code compliance. Plaintiff argues that because the inspector in this case admitted that a certificate could be issued despite the existence of a violation, the certificate was irrelevant to show that defendant did not know or should not have known of the dangerous condition of the cement step. Plaintiff's argument might have merit if the certificate had, in fact, been issued despite a defect being discovered in the cement step. However, there was no such testimony. While the compliance certificate is not conclusive evidence that defendant did not know or should not have known about the hazardous condition

of the concrete step, the fact that the City of Kalamazoo issued a compliance certificate one month before plaintiff's accident was relevant of whether defendant had prior knowledge of the condition.

We also find that the Certificate of Compliance was not more prejudicial than probative. Plaintiff asserted that the natural tendency of the jury would be to view the certificate as evidence that the cement step was not defective. However, as noted above, the compliance certificate was not admitted as substantive evidence of the cement step's condition, and the jury received such a limiting instruction. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Under the circumstances, we do not find that the trial court abused its discretion in admitting the Certificate of Compliance.

Plaintiff also argues that the trial court abused its discretion in refusing to allow plaintiff to question the housing inspector in the presence of the jury regarding the circumstances surrounding the certification procedure or scope of the certification inspection. The trial court stated that testimony concerning the inspection procedures was irrelevant and would distract the jury. The court reasoned that whether the housing inspector actually inspected the cement step has no bearing on whether defendant had notice of its dangerous condition. However, such testimony would have been relevant to the jury's determination of how much weight to give the certificate, particularly because the inspector testified that he could not remember if he specifically inspected the step at issue or whether he made any comment to defendant's building manager.

Nevertheless, we find that any error was harmless. Plaintiff's theory of the case was that because of the then-existing condition of the cement, plaintiff's injury was foreseeable. The inspector gave no indication that inspection of the steps was not within the scope of the housing inspection. Also, the building manager testified that he did not believe the step's condition to be hazardous and he had not heard of any accidents occurring on the step. Additionally, plaintiff and her daughter, two people who walked over the cement steps countless times in six years and, in fact, had done so just minutes before the accident without incident, each testified that she had never personally had a problem walking on the step, and she knew of no accidents that had occurred on the step. Thus, there is no ground for reversal because we do not find that plaintiff's substantial rights were affected. MRE 103(a); *Morrow v Bofferding*, 458 Mich 617, 634; 581 NW2d 696 (1998).

Lastly, plaintiff argues that the trial court erred in failing to instruct the jury on a portion of her proposed instructions concerning the compliance certificate. We review a trial court's decision regarding supplemental jury instructions for an abuse of discretion. *Grow v W A Thomas Co*, 236 Mich App 696, 702; 601 NW2d 426 (1999). "We review the instructions in their entirety and will not reverse a court's decision regarding supplemental instructions unless failure to vacate the verdict would be inconsistent with substantial justice." *Id.* "Supplemental instructions when given must be modeled as nearly as practicable after the style of the Standard Jury Instructions and must be concise, understandable, conversational, unslanted, and nonargumentative." *Stoddard v Manufacturers Nat'l Bank of Grand Rapids*, 234 Mich App 140, 163; 593 NW2d 630 (1999). Furthermore, the trial court does not commit error requiring reversal if the parties' theories and the applicable law were presented to the jury adequately and fairly. *Id.*

Plaintiff's proposed jury instructions consisted of the following three paragraphs:

During this trial I have allowed into evidence, on a limited basis, Defendant's Exhibit A which is the Code Compliance Certificate issued by the City of Kalamazoo.

By allowing this exhibit into evidence, I have not meant to suggest, nor does it mean that the Defendant was excused from its duty to inspect, repair or maintain its' property in a reasonably safe condition just because it received this Certificate.

This evidence is offered only for the limited purpose that a Certificate of Compliance was issued to the property at 515 Pearl Street on 10/10/97.

The trial court allowed the first and third paragraphs to be read, but excluded the second paragraph because it believed that the statements were "more appropriately reserved for argument" and the other paragraphs sufficiently instructed the jury as to the limited use of the evidence.

Plaintiff argues that the trial court's refusal to give the second paragraph of her proposed instructions was error because that refusal left the jury "free to consider" the compliance certificate not only as evidence that defendant did not know about the dangerous condition, but also as evidence that defendant adhered to the standard of care set out in SJI2d 19.03. We disagree. The jury was instructed that the certificate was to be used only as proof that it was issued to defendant and that "[w]hen evidence was received for a limited purpose or limited in some other manner you must not consider it for any other purpose or for any other reason or manner." Additionally, the jury was also instructed on the elements of negligence, specifically defendant's duty to plaintiff. Moreover, one juror asked the court to clarify defendant's duty and the court stated that the jury was to consider how a "reasonably careful landlord would behave under the circumstances as you find them to exist." Accordingly, when the jury instructions are viewed as a whole, we do not find that the trial court abused its discretion in refusing to read the second paragraph of plaintiff's proposed limiting jury instruction.

Affirmed.

/s/ William C. Whitbeck
/s/ Michael R. Smolenski
/s/ Christopher M. Murray